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No. 06-563

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOHN BRIGHT, individually and in his capacity as Administrator of the ESTATE OF ANNETTE BRIGHT, deceased,

Petitioners,

v.

WESTMORELAND COUNTY; TAMI WHALEN, individually and in her capacity as a Probation Officer for Westmoreland County; RICHARD YESKO, individually and in his capacity as a Probation Officer for Westmoreland County; ANTHONY C. GUINTA, individually and in his capacity as Probation Supervisor for Westmoreland County; CITY OF MONESSEN; CARL FRANZAGLIO, individually and in his capacity as a Police Officer for the City of Monessen; PAUL S. KUNTZ, individually and in his capacity as Court Administrator for the Westmoreland County Court of Common Pleas; JOHN PECK, individually and in his capacity as District Attorney of Westmoreland County; and CHARLES KOSCHALK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS CITY OF MONESSEN AND CARL FRANZAGLIO, INDIVIDUALLY AND IN HIS CAPACITY AS A POLICE OFFICER FOR THE CITY OF MONESSEN

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether this Court should deny review of this case since the Petitioner has presented no compelling reason for this Court to exercise its extraordinary jurisdiction in that the state-created danger theory as set forth by the Third Circuit Court in the decision *Bright* does not substantially conflict with any precedent of this Court, Section 1983, the Due Process Clause, any circuit court's decisions, or any of the Third Circuit Court's decisions?

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REASONS FOR DENYING WRIT

This Honorable Court should deny Plaintiff Bright's Petition for a Writ of Certiorari because Plaintiff has failed to present compelling reasons for this Court to exercise its extraordinary and discretionary jurisdiction.

I. Compelling reasons which may lead this Court to grant a Writ of Certiorari

Although not exhaustive, Supreme Court Rule 10 sets forth guidelines for the certiorari process and when same will be granted. Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; had decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state

> court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10.

II. Plaintiff has failed to cite to any compelling reason for this Court to grant certiorari

In this case, Plaintiff claims that there are several compelling reasons for this Court to grant review.[1] Plaintiff alleges that the Third Circuit Court's state-created danger theory is in conflict with this Court's prior precedent, Section 1983 and the Due Process Clause of the

[1] The reasons alleged by Plaintiff as to why this Court should grant certiorari pertain to the Third Circuit's decision as to the state-created danger theory. In Plaintiff's Brief to this Court, Plaintiff also includes in the "Questions Presented for Review" the issues of whether the Third Circuit Court of Appeals erred in finding the state tort wrongful death and survival actions were insufficient as a matter of law since Defendants were not entitled to immunity and in dismissing the state law claims against Defendant Koschalk. However, neither of these issues are raised in "Reasons for Granting the Writ," and therefore, these issues have been waived.

Fourteenth Amendment.[2] Plaintiff further argues that there is a conflict between the decision of *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. Pa. 2006), and other circuit courts' tests as to the state-created danger theory. Lastly, Plaintiff claims that there is a conflict within the Third Circuit as to the state-created danger theory that warrants this Court granting review of same. However, none of these arguments have any merit.

A. There is no substantial conflict between the Third Circuit Court's decision in *Bright*, this Court's prior precedent, Section 1983 and the Due Process Clause of the Fourteenth Amendment.

Plaintiff requests that this Court grant certiorari in this case because the opinion in *Bright* is allegedly contrary to this Court's prior precedent, Section 1983 and the Due Process Clause of the Fourteenth Amendment. However, the reasoning and holding in *Bright* is consistent with this Court's precedent, specifically its interpretation of Section 1983 and the Due Process Clause of the Fourteenth Amendment.

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[2] It is important to note that the Third Circuit Court in *Bright* affirmed the district court based on Plaintiff's failure to plead facts to support the fourth prong of the state-created danger theory. The Third Circuit specifically stated that it did not need to decide whether Plaintiff had pled sufficient facts for the other three prongs of the state-created danger theory. 443 F.3d at 284, n. 8. However, Defendants raised the argument before the district court and the Third Circuit Court that the alleged harm, the murder of the under-aged girl's sister, was not foreseeable, and therefore, the first prong of the state-created danger theory must fail as a matter of law. Judge Smith of the Third Circuit Court agreed. *Id.*

The Third Circuit in *Bright* began its analysis with a detailed discussion of this Court's prior case *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). In *DeShaney*, a tragic case in which a four-year-old boy was beaten so badly that he was left with severe brain damage, this Court concluded " . . . [b]ased upon its the text, history and case law . . . that the Due Process Clause did not impose an affirmative obligation on the state to protect its citizens. . . . " *Bright*, 443 F.3d at 280 (*citing DeShaney*, 489 U.S. at 195-96). The Third Circuit further acknowledged this Court's reasoning for determining that the government does not have an affirmative constitutional duty to protect its citizens:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.
>
> * * *
>
> Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.
>
> * * *
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which

> the government itself may not deprive the individual.

Id. (*citing DeShaney*, 489 U.S. at 195-96).

DeShaney was not the only case in which this Court found that the state does not have an affirmative constitutional duty pursuant to the Due Process Clause of the Fourteenth Amendment and Section 1983, to protect citizens, except under limited circumstances. Prior to *DeShaney*, and since *DeShaney*, this Court has been careful not to expand the Due Process Clause. In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court explained that history supports that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." *Id.* (*citing Hurado v. California*, 110 U.S. 516, 527 (1884) (*quoting Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819)). This Court in *Daniels* also instructed that "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" *Id.*, 474 U.S. at 328, 330 (*quoting Parratt v. Taylor*, 451 U.S. 527, 549 (1981)).

This Court has been careful in other cases not to expand what it firmly believes is the government's duty pursuant to the Due Process Clause. Thus, in *Harris v. McRae*, 448 U.S. 297, 317-18 (1980), this Court held that although the states may not prohibit abortions, there is no affirmative duty to provide funding for this procedure. *See also Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that states have no affirmative duty to provide adequate housing). More recently, in *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2802 (2005), this Court determined

that the government's failure to properly respond to a restraining order violation did not constitute a violation of her Fourteenth Amendment rights.

This Court has consistently found that the Due Process Clause does not impose on the states an affirmative duty to protect citizens[3]. The Third Circuit's reasoning and holding in the *Bright* case is consistent with the plain language of the Due Process Clause and this Court's interpretation of same. Specifically, although it is admittedly sometimes difficult to differentiate action from inaction[4], this prong of the Third Circuit's state-created

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[3] This Court also is cognitive of the numerous and various policy reasons for not finding that a state has an affirmative duty to protect its citizens. Without providing this Court with a dissertation, one strong presumption against governmental liability in failure-to-protect cases is because same would involve the courts in second-guessing political decisions about the use of limited community resources. Barbara E. Armacost, *Article: Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1009 (1996). " . . . [G]overnment actors require freedom in allocating their resources, weighing safety considerations, and heeding the voices of the public at large. Consequently, the state-created danger theory should be narrowly construed in order to avoid usurping state decisions and legislative choices." Jeremy Daniel Kernodle, *Note: Policing the Police: Clarifying the Test for Holding the Government Liable under 42 U.S.C. Section 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 200 (2001). "Expanding the state-created danger theory may deter government officials from taking risks and executing their functions for the public's greatest benefit." *Id.*, 54 VAND. L. REV. at 201. Along with this is the problem of the sheer number of claims that could be brought pursuant to a broader reading of the Due Process Clause. "[T]he litigation burden on government entities and public officials would be enormous." 94 MICH. L. REV. at 1034.

[4] As this Court has advised, " . . . many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary. . . . " *Daniels*, 474 U.S. at 334. The inaction versus action distinction should not be abandoned simply because it is sometimes difficult to apply.

danger theory is reasonable and necessary in order to ensure that the state will not be held liable for its failure to act or protect. This prong of the Third Circuit's state-created danger theory is not contrary to constitutional law or this Court's precedent. Instead, the decision in *Bright* follows the rationale in *DeShaney* for not imposing on the states an affirmative duty to protect.

B. There is no substantial conflict between the Third Circuit Court's decision in *Bright* and the decisions of other circuit courts as to the state-created danger theory.

One reason that this Court sometimes grants certiorari is when decisions of the various circuit courts are in conflict *as to an important issue*. Not all potential conflicts are compelling though. In fact, not surprisingly, this Court has not been able to, and has not even tried, to resolve every possible inter-circuit conflict. Glenn W. Reimann, *Sour Grapes or Sound Criticism: Is the Supreme Court Really Not Taking Enough Non-tax Business Cases?*, 8 U. MIAMI BUS. L. REV. 161, 190 (1999). Instead, it has been opined that generally, " . . . intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995). For an intercircuit conflict to be compelling enough to warrant review, it must be so intolerable that it creates unfairness to litigants in different circuits. *Id.*, 56 U. PITT. L. REV. at 773.

1. The Third Circuit's finding in *Bright* that an affirmative act is necessary in order to state a constitutional claim based on a state-created danger theory has not created a substantial conflict with other circuit courts.

One of Plaintiff's primary contentions is that the Third Circuit is incorrect in incorporating into its state-created danger test the necessity for an affirmative act by the state that places the plaintiff in a worse position. However, out of the ten circuit courts that recognize a state-created danger theory[5], *all* of them require that there be an affirmative act by the state for the state-created danger theory to be applicable. *See Bright v. Westmoreland County*, 443 F.3d 276, 282 (3d Cir. 2006) (explaining that liability under a state-created danger theory is predicated upon the state's affirmative acts); *Wyke v. Polk County School Board*, 129 F.3d 560, 570 (11th Cir. 1997) (*quoting DeShaney*, 489 U.S. at 200) (noting that it will

[5] Two circuit courts, the First Circuit and the Fourth Circuit, have not yet adopted the state-created danger theory as a viable constitutional claim. The First Circuit has not yet rejected this theory, but instead has avoided addressing whether it will recognize a viable constitutional claim pursuant to said theory. *See Rodriguez-Cirilo v. Garcia*, 115 F.3d 50 (1st Cir. 1997). Only the Fourth Circuit has outright rejected a constitutional claim based on a state-created danger theory. *See Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995). Although two circuits have not adopted the state-created danger theory, this does not result in there being a substantial conflict that this Court should address by reviewing the instant case. At no time during this litigation have any of the parties argued, or any of the courts found, that the state-created danger theory is not an accepted, valid theory to assert a constitutional claim under the right circumstances. Since whether or not the state-created danger theory is valid is not in controversy in this case, there is no true conflict between this case and the Fourth and/or First Circuits.

find liability under the state-created danger theory when the state affirmatively acts to restrain an individual's freedom to act on his own behalf); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (finding liability based on the state-created danger theory when the state in some way assists in creating or increasing the danger to the plaintiff); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (explaining that liability is based upon affirmative acts by the state that either creates or increases the risk of violence); *Losinski v. County of Trempealeau*, 946 F.2d 544, 551 (7th Cir. 1991) (finding that before there can be liability, there must be an affirmative act by the state); *Carlton v. Cleburne County*, 93 F.3d 505, 508 (8th Cir. 1996) (requiring affirmative action on the part of the state actor for there to be a state-created danger claim); *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1061 (9th Cir. 1998) (finding that it must be proven at least that the state acted affirmatively); *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001) (explaining that to sustain a state-created danger claim there must be an affirmative act by a state actor that increases or creates the danger to plaintiff); *McClendon v. City of Columbia*, 258 F.3d 432, 437-38 (5th Cir. 2001) (instructing that courts should consider whether a state actor acted with affirmative conduct); and *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 (10th Cir. 1998) (finding that the key factor is the degree of the state actor's culpable knowledge and conduct in affirmatively placing the individual in a position of danger).

Since the other circuit courts that have adopted the state-created danger theory also require an affirmative act by a state actor in order to establish a valid claim, the Third Circuit Court's decision in *Bright* is not contrary to

the decisions of any of the circuits which have already adopted this theory.

2. The Third Circuit's failure to specifically apply and/or adopt the alleged "emboldenment theory" in the *Bright* case does not create a conflict with the decisions of any other circuit courts.

The only other potential conflict raised by Plaintiff between the state-created danger theory affirmed by the Third Circuit in *Bright*, and the state-created danger tests of other circuits, is that a small number of the other circuits have made references to the private third party as being emboldened by the state actors and that this can constitute a state-created danger. Plaintiff argues that this Court should grant his Petition for Writ of Certiorari to determine whether the state-created danger test can include a "theory of emboldenment" since other circuits have referenced same. However, Plaintiff's argument fails to acknowledge the important difference between the facts pled in his Amended Complaint and the facts pled in the complaints at issue in the cases *May v. Franklin County Board of Commissioners*, 59 Fed. Appx. 786 (6th Cir. 2003)[6] and *Brown-Alleyne v. White*, 1999 U.S. Dist. LEXIS 18511 (E.D.N.Y. 1999).

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[6] The Sixth Circuit in the *May* case did not find that "emboldenment" could occur in the absence of an affirmative act. In fact, the Sixth Circuit explained that, "[l]iability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." 59 Fed. Appx. at 792. In *May*, the Sixth Circuit found that the police officer's conduct of going to the door of the apartment where she was being held against her will, knocking, and then leaving, emboldened her kidnapper. *Id.*, 59 Fed. Appx. at 792-93. Thus, it appears from

(Continued on following page)

Plaintiff claims that *May*, *supra*, and *Brown-Alleyne*, *supra*, stand for the proposition that when a state actor emboldens a perpetrator to harm the plaintiff through a combination of action and inaction, there can be a possible constitutional claim based on same. Although the courts in both *May* and *Brown-Alleyne* refer to the perpetrator of the harm being "emboldened" by the state actor, neither of these cases stand for the proposition that if there is emboldenment, there does not need to be an affirmative act which itself increases the risk of harm or danger. In both of these cases, the courts pointed out that an affirmative act which emboldens the perpetrator or increases the risk of harm was required in order to establish a state-created danger theory. *May*, 59 Fed. Appx. at 792; *Brown-Alleyne*, 1999 U.S. Dist. LEXIS 18511 at *6, *9. There is no inconsistency between these cases and the *Bright* case.

Notably, in *Brown-Alleyne*, the alleged *act that led to the emboldenment* of the private third party was a conspiracy on the part of the police not to provide protection. It was pled that there was a deliberate decision within the police department not to prosecute the private third party or assist the plaintiff. *Brown-Alleyne*, 1999 U.S. Dist. LEXIS 18511 at *7-*9. A "conspiracy" necessitates by definition an affirmative act. In fact, there was not just one deliberate act to conspire by the police, but several acts, including the police escorting the private third party from the building after he assaulted the plaintiff and berating plaintiff for calling the police. *Id.*, 1999 U.S. Dist. LEXIS 18511 at *9. A review of the *Brown-Alleyne* case

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the Sixth Circuit's use of the term "embolden" that it was considering this in light of the fact that plaintiff had pled affirmative acts. This is not contrary to the Third Circuit's state-created danger theory.

makes it clear that the court's use of the term "embolden" was used in conjunction with the requirement of an affirmative act that leaves the plaintiff more vulnerable to future violence at the third party's hands. *Id.*, 1999 U.S. Dist. LEXIS 18511 at *8. Thus, even if the district court case *Brown-Alleyne* was controlling in any circuit, the state-created danger theory in that case, which includes "emboldenment" does not really conflict with the *Bright* case.

The other case cited to by Plaintiff for the proposition that the *Bright* case conflicts with other circuit court decisions regarding the state-created danger theory is *May*, *supra*. However, the Sixth Circuit Court of Appeals specifically acknowledged in a later case that the decision in *May* was not precedential since it was unpublished. *Tanner v. County of Lenawee*, 452 F.3d 472, 479 (6th Cir. 2006) (noting that the plaintiff's attempt to cite the *May* case for the proposition that responding to a 911 call gave rise to a duty to protect the caller is not precedential). Moreover, in *May* it was averred in the complaint that what caused the perpetrator to become emboldened were several allegedly affirmative acts by the police, including knocking on the door of plaintiff's apartment, looking into the window, and leaving the apartment. Plaintiff claimed that these allegedly affirmative acts by the police emboldened the perpetrator, who was inside the apartment with plaintiff the entire time the police were outside, to then kill her. *May*, 59 Fed. Appx. at 792-93. The district court in *May* found that these facts as pled were sufficient to establish that an affirmative act by the state increased the risk of danger. *Id.*

To the contrary, in *Bright*, Plaintiff averred in his Amended Complaint that an allegedly affirmative act, i.e.

the confrontation, combined with the omission, i.e. the delay in processing the revocation of probation, emboldened Koschalk or increased the risk of harm to Plaintiff. *See* para. 30(f)(4)-(h) and (31) of Plaintiff's Amended Complaint. (App. 71A-72A). This is different from the allegations pled by the plaintiff in *May* where it was claimed that the *affirmative acts combined together* emboldened the perpetrator and/or increased the risk of harm to the plaintiff. The district court in *May* explained that because it had to accept the facts as pled in the complaint, which included that the police officer did several affirmative acts that emboldened the perpetrator, it could not dismiss the complaint on that basis. *May*, 59 Fed. Appx. at 792-93.

In the instant case, the Amended Complaint specifically alleges only one *arguably* affirmative act, specifically, the confrontation[7]. *See* Plaintiff's Amended Complaint. (App. 64A-76A). What emboldened Koschalk is the confrontation, " . . . coupled with the aforementioned inexplicable *delay*. . . ." *See* para. 30(h) of Plaintiff's Amended Complaint. (App. 72A) (emphasis added). Accepting these

[7] The Third Circuit noted that Officer Franzaglio's offer to help the family by arresting Koschalk was simply a statement of intent to help which courts have routinely found does not lead to a duty to protect. The Third Circuit explained, "Bright does not, and cannot, claim that the state in any way restricted his freedom to act on his family's own behalf. The *DeShaney* Court specifically held that, under these circumstances, no 'affirmative duty to protect arises . . . from the State's . . . *expressions of intent to help*' an individual at risk." *Bright*, 443 F.3d at 284 (*citing DeShaney*, 489 U.S. at 200) (emphasis in original). Notably, Officer Franzaglio's offer to help also cannot be perceived as having emboldened Koschalk to kill the victim's sister since there are no facts pled that Koschalk knew about the conversation between Officer Franzaglio and the Bright family.

facts as true, the district court in the *Bright* case, and as affirmed by the Third Circuit Court of Appeals, concluded that the Plaintiff had failed to plead a prima facie case of state-created danger since Plaintiff claimed it was the alleged affirmative act, the confrontation, along with the failure to follow up, that emboldened Koschalk and increased the risk to Plaintiff. The fourth prong of the state-created danger theory in the Third Circuit requires that an affirmative act cause the danger or increase the risk of harm. *It is not sufficient to allege an act, which by itself does not create or increase the risk of danger, combined with omissions, to meet the fourth prong.* This conclusion is not inconsistent with the decisions in *May* or in *Brown-Alleyne.*

Additionally, the Third Circuit, in *Bright*, clearly did not outright reject the "emboldenment theory" as possibly being part of its state-created danger theory under the right circumstances. To the contrary, the Third Circuit in *Bright* found that it did not need to address whether emboldenment can be a valid theory for liability in light of the facts alleged in the Amended Complaint. Specifically, the Third Circuit found that the alleged emboldenment at issue in the *Bright* case was the delay, or the inaction, in revoking Koschalk's probation. The Third Circuit explained:

> It is specifically alleged that what "emboldened" Koschalk and thereby contributed to that decision was a belief "that he would not confront effective law enforcement action as he progressed with his scheme to retaliate." First Amended Complaint at P31, App. at 58a. It is the state's creation of that belief that is said to have rendered Annette more vulnerable than she would otherwise have been. We may assume for present

> purposes that the creation of that belief could reasonably be attributed to the ten week delay in serving Koschalk with notice of his probation violation hearing. It could not reasonably be attributed, however, to the probation officer's calling a probation violation a probation violation when confronted with it on May 4th.

Bright, 443 F.3d at 285. Because what allegedly emboldened Koschalk was clearly inaction, the delay in providing notice of his probation violation and hearing, and not an affirmative act as required by the fourth prong of the Third Circuit's state-created danger theory, the Third Circuit confirmed that the fourth prong of the test could not be met by the facts pled in Plaintiff's Amended Complaint. Since the facts alleged in Plaintiff's Amended Complaint could not meet the fourth prong, i.e. that an affirmative act that itself created an opportunity of danger to the victim or rendered the victim more vulnerable to the danger than had the state not acted at all, it was unnecessary for the Third Circuit to then examine the validity of the alleged "emboldenment theory".

C. The *Bright* case does not create a conflict within the Third Circuit as to the state-created danger theory that warrants this Court granting review of this case.

1. The proposed "test" advocated by Plaintiff and the dissent in *Bright* for the fourth prong of the state-created danger theory is not consistent with this Court's rationale in *DeShaney* which is the basis of the state-created danger theory.

Although Plaintiff and the dissent in *Bright* argue that the majority's opinion incorrectly adds an element or

extra requirement to the fourth prong of the Third Circuit's state-created danger theory, in reality, *it is the test proposed by Plaintiff and the dissent that is inconsistent with established Third Circuit law.* Since the dissent's opinion is not controlling and precedential, there is no compelling "intra-circuit" conflict for this Court to review.

a. The Plaintiff's and the dissent's interpretation of the fourth prong of the state-created danger theory is a misstatement of the law.

Although not specifically stated as such, essentially the Plaintiff argues, and the dissent in *Bright* agrees, that it is incorrect that the state-created danger theory in the Third Circuit requires an affirmative act that itself caused or increased the risk of injury to establish the fourth prong. Instead, the Plaintiff and the dissent claim that the fourth prong can be met when there is an omission that increases the danger, combined with an allegedly affirmative act, even if that affirmative act did not contribute to or increase the danger to the plaintiff by itself. The dissenting judge in *Bright*, Judge Nygaard, stated that it is the " . . . totality of the conduct that must be analyzed under the fourth element of the state-created danger exception." *Bright*, 443 F.3d at 290. Judge Nygaard explains that although mere inaction will not support a state-created danger claim, if there is an act, coupled with an omission that increases the alleged harm, this is sufficient. *Id.*, 443 F.3d at 290-91. The implication from the test proposed by Judge Nygaard is that the omission can be what increased the danger to the Plaintiff as long as there also is some type of affirmative act involved, and even if that affirmative act by itself would not have

increased the danger.[8] However, omissions, without an affirmative act that causes or increases the risk of harm, are not actionable constitutional violations.

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[8] At one point, Judge Nygaard in his dissent indicates that Plaintiff has pled that the confrontation itself, which is the only averred fact that arguably may constitute an affirmative act, triggered the increased risk of violence. *Bright*, 443 F.3d at 291. However, this is incorrect. Judge Nygaard stated that there is an inference from this allegation that the " . . . the confrontation itself plays an integral role in creating an opportunity for harm that would otherwise not have existed, placing this case outside the purview of *DeShaney* and firmly within the ambit of our state-created danger exception." *Id.* Judge Nygaard then states that because the Plaintiff claimed in his Amended Complaint that the confrontation itself triggered an increased risk of harm that this must be accepted as true for purposes of a Rule 12(b)(6) motion. *Id.*, 443 F.3d at 291, n. 13. By making these statements, it appears that Judge Nygaard is asserting that even if the majority finds that the fourth prong of the state-created danger theory requires an affirmative act that itself causes or increases the risk of harm to the plaintiff, Plaintiff's Amended Complaint pleads sufficient facts to meet that standard. Nowhere in Plaintiff's Amended Complaint, however, does Plaintiff claim that the allegedly affirmative act, i.e. the confrontation, alone increased the risk of danger to Plaintiff. *See* Plaintiff's Amended Complaint. (App. 64A-76A). To the contrary, it is repeatedly alleged in Plaintiff's Amended Complaint that it was the confrontation, *coupled with the alleged delay*, which increased the risk of harm. *See* para. 30(f)(4), 30(g)(h) and 31 of Plaintiff's Amended Complaint. (App. 64A-72A). Since there were no facts pled in the Amended Complaint to support that the confrontation itself, the only possible affirmative act pled, increased the risk of danger, the majority did not have to accept same as true for purposes of the Rule 12(b)(6) motion.

b. The Plaintiff's and the dissent's interpretation of the fourth prong of the state-created danger theory as not requiring an affirmative act that itself causes or increases the risk of harm is inconsistent with this Court's precedent and interpretation of the Due Process Clause.

Omissions coupled with unrelated allegedly affirmative acts are not sufficient to meet the fourth prong of the state-created danger theory. This is supported by the reasoning in *DeShaney*, *supra*. Although this Court did not specifically address the issue of the state-created danger theory in *DeShaney*, this test was adopted by many courts because of wording contained in *DeShaney*, which indicated that this Court would likely find that if the state created danger, then this may be an exception to the general rule that a state has no duty to protect citizens from violence by private actors. This language was discussed by the majority in *Bright* as being the foundation for the Third Circuit Court's state-created danger theory. *Bright*, 443 F.3d at 280-81.

Specifically, in *DeShaney*, there was an affirmative act by the state. The state at one point had removed a young boy from his father's home. *DeShaney*, 489 U.S. at 192. The state then released the boy back to his father's home. During the months following the boy's release back to his father's home, a state case worker was aware of signs and reports of abuse, but did nothing. *Id.* During this period of time, the boy's father beat him so severely that he became brain-damaged. *Id.* This Court first found that there is no constitutional duty for the state to protect citizens from violence of third parties. *Id.*, 489 U.S. at 196-97. This

Court then went on to discuss a possible exception to this rule, i.e. if there is a special relationship between the state and the citizen such as the citizen being in state custody. Under those circumstances, there may be a duty to protect. *Id.*

This Court then explained, in *DeShaney*, that the only other possible scenario in which a state may have a duty to protect a citizen from a private actor would be if it played a part in the creation of the danger or made that citizen more vulnerable to the danger. *DeShaney*, 489 U.S. at 200. Importantly, this Court did not find that because the state had at one point taken the affirmative act of placing the boy in state custody, but then released him, that this was sufficient to establish that the state created or increased the danger to the boy. In fact, this Court explained that returning the boy to his father's custody placed him in no a worse position than he was before. *Id.* This Court further explained that the state does not become the " . . . permanent guarantor of an individual's safety by having once offered him shelter." *Id.* Although not specifically stated in *DeShaney*, it appears that the affirmative act of removing the boy from his home, coupled with the failure to then protect him after he was returned to his home, was not sufficient for this Court to find that the state increased the risk of danger to the boy. The later alleged omissions by the state also were not enough to create a duty to protect.

The reasoning in *DeShaney*, which was cited to by the majority in *Bright*, is instructive on what triggers the state to become responsible to protect a citizen from actions by a private person. Pursuant to this Court's reasoning in *DeShaney*, the affirmative act by the state must be what causes or increases the risk of harm in order

for the state to have a duty to protect. This is not only the rationale used in *DeShaney*, but also is supported by common sense and public policy. If this Court in *DeShaney* had found that the state's one time attempt to help the boy then triggered a continuing duty to protect him, for which the state could become liable for failing to do, then this would discourage state actors from attempting to perform their jobs, which may include helping private citizens.

In the instant case, if the Third Circuit accepted the proposed test set forth in *Bright* by the Plaintiff and the dissent, then any time there is an affirmative act by the state to help a private citizen, but later that citizen is injured, there would be an arguable constitutional violation. This would result in the state becoming the warrantor of the private citizens' welfare and safety, something which this Court in *DeShaney* specifically found that the Due Process Clause doesn't support. This also would encourage state employees to do nothing instead of attempting to perform their jobs or help private citizens. It is respectfully submitted that this is certainly not a situation that this Court wishes to encourage through the state-created danger theory, and in fact, the *DeShaney* case supports same. Thus, if any conflict exists, it is between the dissent's opinion and this Court's decisions.

2. The majority's opinion in *Bright* is not contrary to or inconsistent with the Third Circuit's prior cases as alleged by Plaintiff and the dissent.

This Court should also reject Plaintiff's request for certiorari since there really is no substantial conflict *within* the Third Circuit as to the state-created danger theory. From the time the state-created danger theory was

adopted in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), to as recently as the case *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006),[9] the Third Circuit has consistently found that there must be an affirmative act that causes or increases the danger in order to meet the fourth prong of the state-created danger theory. In fact, even before the Third Circuit officially adopted the state-created danger theory in *Kneipp*, it noted that if said theory was applicable, the plaintiff would be required to plead facts to support that an affirmative act created a danger to plaintiff that he or she otherwise would not have encountered. *See D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1374 (3d Cir. 1992) (explaining that the state-created danger theory is " . . . predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger.")[10]; and *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) (noting that the state-created danger theory required that the state actors used their authority to create an opportunity that otherwise

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[9] In *Sanford*, the Third Circuit agreed with the district court that plaintiff was attempting to characterize the defendant's failure as an affirmative action, when instead, it was really an allegation that the defendant failed to prevent the plaintiff's death. It did not accept this factually unsupported conclusion as true. The Third Circuit in *Sanford* affirmed that a failure to prevent injury or protect is not something that violates the Due Process Clause according to *DeShaney*, and therefore, it affirmed the district court's judgment in favor of defendant. *Sanford v. Stiles*, 456 F.3d at 312.

[10] In *D.R. by L.R.*, the Third Circuit found that it was necessary to plead an affirmative action in order to establish a claim based on a state-created danger theory even though it also acknowledged that sometimes it could be difficult to distinguish between action and inaction. *Id.* The Third Circuit then went on to find that the school defendants did not create the plaintiff's peril or increase the risk that she would be assaulted by other students in the school's bathroom. *Id.*, 972 F.2d at 1375.

would not have existed, but declining to apply said test since it found that the alleged risk at issue was not foreseeable).

The majority in *Bright* specifically addressed the issue of whether it was improperly reading a requirement of an affirmative act into the fourth prong of the state-created danger theory. The majority, in rejecting said argument, explained that the very language cited to by the dissent, i.e. that the "state used its authority to create an opportunity that otherwise would not have existed" requires an affirmative act. *Bright*, 443 F.3d at 283, n. 6. The majority in *Bright* stated:

> We perceive no conflict, however, between *D.R.* and those cases which phrase the fourth element in terms of whether "state actors used their authority to create an opportunity that would not otherwise have existed" for injury to the plaintiff. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995). In our view, "state actors" cannot "use their authority" to create such an opportunity by failing to act.

Id. The requirement that the state actor uses his or her authority to create a danger necessitates an affirmative act. Otherwise, the state actor would not be "using" his or her authority. The majority essentially found that the Plaintiff and dissent were attempting to create a distinction where no distinction really existed.

The cases cited to by Plaintiff and in the dissent's opinion in *Bright* are not contrary to the majority's finding that an affirmative act is necessary in order to establish the fourth prong of the state-created danger theory. Plaintiff

attempts to argue that the Third Circuit in the *Morse v. Lower Merion School District*, 132 F.3d 902 (3d Cir. 1997)[11], rejected its earlier decisions in which it required an affirmative act in order for a plaintiff to establish the fourth prong of the state-created danger theory. The entire basis for this argument is one sentence taken out of context in the *Morse* case. The sentence at issue states, "[t]hus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act." *Id.*, 132 F.3d at 915. This one sentence is the foundation for the Plaintiff's and the dissent's argument that the Third Circuit has rejected its prior requirement of an affirmative act.

Importantly, and as the majority in *Bright* pointed out, this one sentence in *Morse* must be read in the context in which it was stated and not in isolation. *Bright*, 443 F.3d at 283, n. 7. In *Morse*, the plaintiff, who was a teacher at a day care center within the defendant school, was killed by a mentally disturbed third party who entered the school through a door that was supposed to be kept locked. It was alleged that the school had unlocked the door so as to allow construction workers to have easy access to

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[11] Judge Nygaard argues in his dissent that the majority improperly inserts the word "affirmatively" into the fourth prong of the state-created danger theory. *Bright*, 443 F.3d at 292. However, Judge Nygaard in his concurring opinion in the case *Schieber v. City of Philadelphia*, 320 F.3d 409, 425 (3d Cir. 2003), specifically noted " . . . '[l]iability under the state-created danger theory is predicated upon the states' *affirmative* acts which work to plaintiffs' detriment in terms of exposure to danger.'" (*citing D.R. by L.R.*, 972 F.2d at 1374) (emphasis added).

perform their jobs. *Morse*, 132 F.3d at 904. In affirming the district court's grant of summary judgment to the defendant school, the Third Circuit Court held that the plaintiff failed to prove the first prong of the state-created danger theory. Specifically, it held that plaintiff failed to prove that it was foreseeable that unlocking the school door so that construction workers could use same would result in a murder by a mentally unstable third party. *Id.*, 132 F.3d at 908.

In *Morse*, the Third Circuit also discussed the fourth factor of the state-created danger theory and whether it had been met by the plaintiff. The Third Circuit noted that the district court had found that plaintiff did plead an affirmative act, i.e. the school's unlocking the school's door, but had not then gone on to find whether the fourth prong had been met since it found that plaintiff had failed to meet the first prong of foreseeability. The district court also stated that despite the fact that there was an affirmative act, it did not know whether that act rose "to the level required to impose liability under the state-created danger theory". *Id.*, 132 F.3d at 914.

It was within this context that the Third Circuit Court in *Morse* discussed that "the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act." The Third Circuit was addressing the fact that even if a plaintiff can plead an affirmative act, that doesn't necessarily mean there is liability pursuant to the state-created danger theory. The determinative factor is whether the danger was foreseeable. If the danger is not foreseeable, then even if there is an affirmative act, there will be no liability.

The Third Circuit in *Bright* discussed the context of this statement in *Morse* and concluded:

> We concluded [in *Morse*] the question of whether an affirmative act was required had been answered by *Mark v. Borough of Hatboro. Mark* articulated the fourth element of the test as requiring that "state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *Mark v. Borough of Hatboro,* 51 F.3d 1137, 1152 (3d Cir. 1995). A use of authority that creates an opportunity for harm necessarily entails an affirmative act. But an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff. In *Morse*, this meant asking whether unlocking the door created a foreseeable opportunity for the plaintiff to be attacked by a mentally ill intruder. Only then would the state actor have "used its authority to create an opportunity which otherwise would not have existed for the specific harm to occur." *Morse,* 132 F.3d at 914. In this context, we do not read *Morse's* language to suggest liability can be based on an omission alone or a failure to act. We read it to clarify that the relevant test involves asking whether a state actor's behavior constituted an affirmative act, and, if so, whether the affirmative act created a foreseeable opportunity for harm.

Bright, 443 F.3d at 283, n. 7 (emphasis in original). As stated by the Third Circuit in *Bright*, when *Morse* is examined in its entirety, it does not stand for the proposition that the Third Circuit has rejected the requirement that there be an affirmative act in order for there to be a valid claim based on the state-created danger theory.

Subsequent Third Circuit case law also confirms that an affirmative act is necessary. *See Sanford*, *supra*; *Kaucher v. County of Bucks*, 455 F.3d 418, 431 (3d Cir. 2006) (noting that the state-created danger theory may be applicable when the " . . . state may assume responsibility for the safety of an individual for whom it affirmatively creates or enhances a risk of danger.") (*citing Kneipp*, 95 F.3d at 1208); *Mohammed v. the Sch. Dist. of Phila.*, 2006 U.S. App. LEXIS 13814 at *5-*6 (3d Cir. 2006) (noting with approval its prior decision *Bright*, specifically that liability pursuant to the state-created danger theory is " . . . predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of exposure to danger.") (*citing D.R. by L.R.*, 972 F.2d at 1374) (emphasis in original); and *Vasquez v. AG of the United States*, 2006 U.S. App. LEXIS 31237 at *11-*12 (3d Cir. 2006) (explaining that the state-created danger theory may be applicable when the state affirmatively places the person in a position of danger the person otherwise would not have faced).

The other case cited by Plaintiff which he claims stands for the proposition that an affirmative act is not necessary to establish the fourth prong of the state-created danger theory is *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004). Plaintiff argues that in *Rivas*, the Third Circuit found that an omission was sufficient to establish the fourth prong of the state-created danger theory. However, in *Rivas*, the Third Circuit applied the well-established fourth prong of the state-created danger theory and found that there was an affirmative act that put the plaintiff in more danger than if the defendant state actors had not acted at all. Briefly, in *Rivas*, emergency personnel were called to plaintiff's home because he appeared to be having a seizure. One of the emergency personnel claimed

that when she entered the home, the plaintiff attacked her. *Id.*, 365 F.3d at 185. The emergency personnel telephoned the police and reported to them that they were attacked by the plaintiff and requested assistance. Upon arriving, the police restrained plaintiff which led to his death. *Id.*, 365 F.3d at 188. The Third Circuit Court in *Rivas* found that the plaintiff had established that the state actors had used their authority to create an opportunity for danger that otherwise would not have existed. *Id.*, 365 F.3d at 194-95. The Third Circuit explained that a jury could reasonably infer that the *actions taken* by the emergency personnel, i.e. reporting that the plaintiff was attacking them, placed plaintiff in greater danger. *Id.*, 365 F.3d at 195.

The finding that the fourth prong of the state-created danger theory had been met in *Rivas* is not contrary to the Third Circuit Court's decision in *Bright*. In *Rivas*, what placed the plaintiff in greater danger was the emergency personnel reporting that plaintiff had attacked them. This is what made it more likely that the police would be aggressive when they arrived at the house. It was an affirmative act that placed the plaintiff in danger, and therefore, *Rivas* is consistent with the test referenced in *Bright* and its holding. The Third Circuit Court in *Bright* explained why *Rivas* is not contrary to its decision:

> *Rivas* is not to the contrary. There, two state actors, emergency medical technicians, affirmatively used their state authority to create an opportunity for injury to the plaintiff by summoning the police and providing them with information that could be expected to cause the police to treat the plaintiff's decedent in a highly dangerous manner – *i.e.*, "Garcia and Rodriguez informed the police that Mr. Rivas had assaulted

> one of them but did not inform the police about Mr. Rivas's medical condition or warn the officers that Mr. Rivas should not be restrained." *365 F.3d at 195.* We perceive little similarity between that case and this.

Bright, 443 F.3d at 283, n. 6. Contrary to what the Plaintiff argues in his Petition for Writ of Certiorari, there is no intra-circuit conflict in the Third Circuit as to the state-created danger theory caused by the *Bright* decision.

CONCLUSION

None of the reasons set forth in Plaintiff's Petition for Writ of Certiorari compel this Court to grant review. There are no substantial conflicts between the *Bright* decision and any other circuit court. The *Bright* decision also is not inconsistent with this Court's precedent or other cases from within the Third Circuit Court of Appeals.

Although Plaintiff attempts to argue that the *Bright* decision conflicts with this Court's precedent, Section 1983, the Due Process Clause, other circuit courts' opinions and Third Circuit Court decisions, the actual basis for Plaintiff's appeal is that the majority in *Bright* allegedly misinterpreted the Third Circuit's state-created danger theory. Misapplication of an established rule of law does not equate with a reviewable substantial conflict though.

According to this Court's rules, it is not the function of this Court to second-guess interpretations of facts. If this Court did believe that any time it examined a set of facts, and perhaps would have decided differently from the court below, it would grant review, this Court would be flooded with even more cases than it already receives. Instead,

this Court serves the limited, but extremely important, purpose of reviewing cases for compelling reasons. It is respectfully submitted that such a role is not called into play in this case.

Undoubtedly, the facts pled in this case outline tragic events. The facts pled in *DeShaney*, *supra*, and *Castle Rock*, *supra*, also were tragic. As in the instant case, children in those cases were subject to vicious acts by private third parties. Regardless of how sympathetic the parties and the circumstances are in these cases, or how egregious the acts of private third parties, these attacks by private third parties cannot be considered a constitutional violation by the state when the state took no affirmative action which directly caused the increase in danger or harm that otherwise would not have occurred.

From the facts pled in Plaintiff's Amended Complaint, which were accepted as true by the district court and the Third Circuit Court, this is not a case where the state, through its probation officers and police, placed the Plaintiff in a position of danger from a private party, Koschalk, which she otherwise was not already in, and then failed to protect her. The alleged affirmative act, i.e. the confrontation between the probation officer and Koschalk, did not place the Plaintiff, the sister of the under-aged girl, in danger. It was the later delay in having a hearing on the probation violation which allegedly caused or emboldened Koschalk to retaliate against the family. This failure to act is not a constitutional violation. If this was considered a constitutional violation, then anytime a private citizen, who perhaps was committing a crime, was approached by a state agent, such as the police, but not immediately taken into custody, and then later committed a crime that the state failed to stop, there would arguably be a cause of action pursuant to the Due

Process Clause. The Due Process Clause and the state-created danger theory in any circuit, including the Third Circuit, do not impose such a broad duty on the state.

Wherefore, for all of the reasons set forth herein, Defendants respectfully request that this Honorable Court deny Plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

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